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DISCUSSION OF RECENT DECISIONS

CONTRACTS—PERFORMANCE OR BREACH—DISCHARGE BY IMPOSSIBILITY WHERE A CORPORATION BECOMES INSOLVENT.—The defendant, in the case of *O'Hern* v. *De Long*,[1] had given a note secured by a mortgage. These were assigned to the Peoria Life Insurance Company. A partnership, of which the defendant was a member, was given an agency by the insurance company. The contract by which the agency was created provided that the partnership should solicit insurance for the company and would receive as compensation 60 per cent of the first year's premium and 7½ per cent commission from renewal premiums for the second to the tenth year inclusive on each policy written. It was expressly provided that commissions would only accrue when the premiums had been paid in cash. The partnership, over a period of several years, wrote a large amount of insurance, of which about five hundred policies were still in force when the company, because of insolvency, was ordered dissolved at the instance of the Director of Insurance. The plaintiff, receiver, brought this action to foreclose the mortgage on the defendant's property. The defendant as assignee of all claims by the partnership against the corporation set up a counterclaim insisting that the corporation was guilty of an anticipatory breach of contract whereby the defendant had been deprived of the renewal commissions that he would have received had the corpora-

[1] 19 N.E. (2d) 214 (Ill. App., 1939).

tion remained solvent and in existence. The Illinois Appellate Court refused to allow the counterclaim.

The court seems to reach its result by making an analogy between the death of a party whose existence is necessary for the performance of the contract—as where a person has contracted to render personal services—and this case where the corporate "person" has "died" because of dissolution. In support of this contention the court cited the case of *People* v. *Globe Mutual Life Insurance Company*,[2] where the New York court upon very similar facts said, "The subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were [sic] not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed."

The analogy is probably unfortunate. It attempts to bring a new situation within the purview of a rule laid down to control situations having materially distinguishing facts. In the case of an individual, death is a certainty, and the parties can logically be presumed to have intended the contract to terminate should death prevent further performance.[3] A corporation, on the other hand, is an artificial person capable of "living" on forever, and therefore its "death" cannot normally be said to be a factor which was in the minds of the parties at the time of contracting. This is especially true of corporations whose existence is not specifically limited by law or their charters. A second objection to the analogy is that the death of a natural person is usually without his fault, while the dissolution of a corporation is almost without exception a result of the corporation's doing acts or getting into circumstances which are considered legally the fault of the corporation. Saying that the dissolution of a corporation is analogous to the death of a contracting party only tends to cause one to lose sight of this very important fact. Still another objection, apparently overlooked by the courts, is that the dissolution of the corporation has not made its performance impossible. Its obligation is to pay

[2] 91 N.Y. 174 at 179 (1883). See also Hepburn v. Montgomery, 97 N.Y. 617 (1884); Griffith v. Blackwater Boom & Lumber Co., 46 W. Va. 56, 33 S.E. 125 (1899); McElheney v. Jasper Trading Co., 12 Ga. App. 790, 78 S.E. 727 (1913); Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 A. 1089 (1912); Louchheim v. Clawson Printing Weighing Co., 12 Pa. Super. 55 (1899); Law v. Waldron, 230 Pa. 458, 79 A. 647 (1911); Williamson County B. & T. Co. v. Roberts-Buford Dry Goods Co., 118 Tenn. 340, 101 S.W. 421, 9 L.R.A. (N.S.) 644 (1907); Lenoir v. Linville Improvement Co., 126 N.C. 922, 36 S.E. 185, 51 L.R.A. 146 (1900).

[3] White v. White, 274 Ill. App. 531 (1934); Cutler v. United Shoe Mach. Corp., 274 Mass. 341, 174 N. E. 507 (1931); Cameron-Hawn Realty Co. v. Albany, 207 N.Y., 377, 101 N.E. 162, 49 L.R.A. (N.S.) 922 (1913).

money, and its assets still remain for the purpose of satisfying such obligations. We are not confronted with the question of whether the corporation is able to reap the benefits of its bargain. Nor is it logical to liken the case to the death of a personal employer. The claim of the defendant in the case under discussion was not based on the refusal of the employer to continue the employee in its employ, being instead a claim for compensation accruing for services already rendered.

A view opposed to the New York decisions arose in New Jersey, recognizing the difficulties of the logic in the New York cases.[4] The courts there refused to concede that the dissolution of the corporation can reasonably be said to have been within the contemplation of the parties; hence they refused to concede that its continued existence must be considered an implied condition to their agreement. The Louisiana court, in *Chas. E. & W. F. Peck* v. *Southwestern Lumber & Exportation Company*,[5] said: "The argument that the intention of the court, or, in other words, of the 'sovereign power,' operates as a vis major, loses sight of the fact that such intervention is the necessary consequence of the acts of the corporation itself in provoking the appointment of a receiver by the mismanagement of its affairs."

Assuming that the company's insolvency is solely the result of misfortune, this fact, in the case of contracts between individuals, is held to be only a subjective impossibility, as the party impliedly promises to keep himself in such financial condition as not to interfere with the performance of the contract.[6] Why there should be a different result in the case of a corporation is not apparent.

With this very unsatisfactory difference of opinion existing, the United States Supreme Court was called upon to make a choice between these two opposing views in the leading case of *Central Trust Company of Illinois* v. *Chicago Auditorium Association*.[7] In that case a transfer company made a contract with the Chicago Auditorium Association, providing that a certain amount of money should be paid by the transfer company in consideration of being given the exclusive right to transport passengers and luggage to and from the hotel. The transfer company went into involuntary bankruptcy, and the association submitted a claim for breach of contract. The court expressly denounced the New York doctrine, saying: "The same principle that entitles the promisee to continued willingness [to perform on the promisor's part] entitles him to continued ability

[4] Spader v. Mural Decoration Mfg. Co., 47 N.J. Eq. 18, 20 A. 378 (1890); Rosenbaum v. U.S. Credit-System Co., 61 N.J.L. 543, 40 A. 591 (1898).

[5] 131 La. 177, 59 So. 113 (1912). See also Roehm v. Horst, 178 U.S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (1900). In Delaware the courts have made a distinction between contracts for the sale of goods and contracts for personal services, holding that dissolution because of bankruptcy does not amount to a breach of the latter but it does of the former. Compare these cases: Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 A. 1089 (1912); In Re Ross & Son, Inc., 10 Del. Ch. 434, 95 A. 311 (1915).

[6] Dean v. Lowey, 50 Ill. App. 254 (1893); Sliosberg v. New York L. Ins. Co., 244 N.Y. 482, 155 N.E. 749 (1927); Slaughter v. C.I.T. Corp., 229 Ala. 411, 157 So. 463 (1934).

[7] 240 U.S. 581, 36 S. Ct. 412, 60 L.Ed. 811, L.R.A. 1917B 580 (1916).

on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement."

This case overruled the majority of the decisions in the lower federal courts[8] on this point and definitely initiated a trend in the state courts to a position opposing the New York doctrine.[9]

The Illinois court, finding it necessary to avoid the logic of the United States Supreme Court, differentiates the two cases on the ground that the corporation's promise and obligations in the Chicago Auditorium case were unconditional. In the Illinois case, the defendant's promise is conditioned upon the payment of premiums, which condition cannot happen, and therefore the company's obligation, according to the court, has not, and never will, come into existence.[10]

It is true, that as a general rule, a condition is not excused merely because it becomes impossible for the condition to occur. One very well recognized exception to this rule, however, is that the condition precedent is excused when the person whose promise is thus conditioned prevents, by his own acts, the happening of the condition. This is, of course, assuming that the parties did not contemplate that the promisor might interfere with the happening of the condition, which brings us right back to the controversy decided in the Auditorium case, namely, whether the cor-

[8] Malcomson v. Wappoo Mills, 88 F. 680 (1898); Moore v. Security Trust & Life Ins. Co., 168 F. 496 (1909); In re Imperial Brewing Co., 143 F. 579 (1906); In re Inman & Co. 171 F. 185 (1909).

[9] See Milton v. Bank of Newborn, 30 Ga. App. 55, 116 S.E. 861 (1923), overruling McElheney v. Jasper Trading Co., 12 Ga. App. 790, 78 S.E. 727 (1913). See also Napier v. People's Stores Co., 98 Conn. 414, 120 A. 295, 33 A.L.R. 499 (1923); Rosenfield v. Connecticut Fruit & Comm. Co., 98 Conn. 428, 119 A. 895 (1923); Baird v. John H. Baird Co., 120 A. 299 (Conn., 1923); American Sugar Refining Co. v. Blake, 102 Conn. 194, 128 A. 523 (1925).

[10] A question might be raised as to the uncertainty of damages, in view of the fact that they are contingent upon the payment of premiums by the insured. Although no definite criterion can be found, the best considered cases seem to indicate that this case is well within those whose damages are provable with an adequate degree of certainty. Where the promisee is certain to receive damage, as we must admit he is in this case with five hundred policies in force at the time of bringing the action, a minimum of proof of the amount of damage is required. See Leach v. New York, N.H. & H.R. Co., 35 N.Y. S. 305 (1895); Lanahan v. Heaver, 79 Md. 413, 29 A. 1036 (1894). Especially can tolerance be exercised in the proof of damages when the breach is the direct cause of the damages being uncertain. "Where a right to a promised performance is conditional upon the happening of some fortuitous event, the promisee can recover damages measured by the value of the conditional right at the time of breach, (a) if it is impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach. . . ." Restatement of Contracts, § 332. See Taylor Mfg. Co. v. Hatcher & Co., 39 F. 440, 3 L.R.A. 587 (1889); Myers v. Sea Beach R. Co., 60 N.Y.S. 284 (1899); Shoemaker v. Acker, 116 Cal. 239, 48 P. 62 (1897); Cutting v. Miner, 52 N.Y.S. 288 (1898); Salinger v. Salinger, 69 N.H. 589, 45 A. 558 (1899).

poration is legally at fault when it becomes insolvent and is thereby dissolved. The Auditorium case answered this in the affirmative, and it may reasonably be doubted whether one can avoid saying that the corporation has legally prevented the happening of the condition precedent to its promise if the logic in that case is followed. W. L. THOMPSON

CRIMINAL LAW—DIRECTION OF VERDICT—POWER OF COURT TO RESERVE RULING ON MOTION FOR DIRECTED VERDICT.—*United States* v. *Standard Oil Co. (Indiana)*[1] was a prosecution for violation of the anti-trust laws conducted in the United States District Court for the Western District of Wisconsin. At the close of the evidence, motions for directed verdicts were made on behalf of certain defendants. The rulings on these motions necessitated the examination of a voluminous record, and, in order not unduly to detain the jury,[2] the court reserved its rulings thereon and allowed the case to go to the jury. Subsequent to the jury's verdict of guilty as to these defendants, the court, pursuant to the reservation, granted motions for judgments in form non obstante veredicto resulting in the dismissal of said defendants.

Following this action a petition was filed by the United States in the Circuit Court of Appeals of the Seventh Circuit, entitled *Ex parte United States*,[3] for an order directing the District Judge to show cause why mandamus should not issue compelling him to expunge the orders of dismissal.[4] The grounds relied upon by the government were (1) that such action was an invasion of the constitutional right to trial by jury[5] and (2) that there was no authority for the court to adopt such procedure in a criminal prosecution.[6] The Court denied the United States' petition for writ of mandamus, holding that there was no valid constitutional objection to the procedure followed by respondent and that in the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks.[7]

It is well established that the court's action in sustaining a motion for a directed verdict does not invade the constitutional guarantee of the right to trial by jury as it existed at common law, nor does it invade the

1 24 F. Supp. 575 (1938).

2 The jury had been sequestered from October, 1937, to January, 1938.

3 101 F. (2d) 870 (1939).

4 This type of action was necessary to raise the point, since no appeal by the prosecution was possible after dismissal of the defendants.

5 The government's contention was based upon the fact that at common law the court could only grant a new trial after verdict had been taken and could not order a dismissal under these circumstances.

6 The government further contended that the respondent had not *in fact* reserved his rulings on the motions for directed verdicts but had taken the jury's verdicts of guilty unconditionally. The Circuit Court of Appeals found that respondent had in fact so reserved his rulings.

7 The decision in the instant case was forecast by the action taken in Collenger v. United States, 50 F. (2d) 345 (1931), decided by the same Circuit Court of Appeals, wherein the court felt itself powerless to act, except to grant a new trial, as the trial court had not reserved the right to pass on the motion for directed verdict after taking the verdict.

province of the jury.[8] Decisions upon questions of law are within the exclusion province of the court.[9] How, then, could the conditional taking of a jury's verdict, subject to the court's reserved ruling on such legal question, abridge this guarantee? The question of law as to the legal sufficiency of the evidence remains a question of law until it is disposed of one way or the other. To take the jury's verdict conditionally, pending the decision of this legal question by the court, as a convenience to the jury, court, and litigants, where as a matter of law there is no fact to be tried by the jury and to so decide subsequently by granting a judgment notwithstanding the jury's verdict is tantamount to withdrawing the case from the jury in the first place, as is done by granting a motion for directed verdict. Such at least is the holding in civil cases at present.[10]

Do the federal courts possess inherent power to adopt such procedure in criminal cases where there is no constitutional objection and where the field is unoccupied by federal legislation?[11] Where Congress has not directed the courts to follow state laws on a particular subject, the federal courts have frequently in procedural matters, by right of the court's own power, changed and applied common law principles in the light of reason, experience, and changing public policy.[12] That the courts have

[8] Sparf v. United States, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895); United States v. Fullerton, Fed. Cas. No. 15,176 (1870); United States v. Babcock, Fed. Cas. No. 14,486 (1876); Rosen v. United States, 161 U. S. 30, 16 S. Ct. 434, 40 L. Ed. 606 (1896).

[9] Sparf v. United States, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894); United States v. Fullerton, Fed. Cas. No. 15,176 (1870); Nosowitz v. United States, 282 F. 575 (1922); Cady v. United States, 293 F. 829 (1923). Nor is the principle that one shall not be put twice in jeopardy of life or limb for the same offense violated by a directed verdict of innocence. Patton v. United States, 281 U. S. 276 at 288-9, 50 S. Ct. 253, 74 L. Ed. 854 (1930).

[10] In Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913), the United States Supreme Court held, five to four, that a judgment of dismissal notwithstanding the jury's verdict was an abridgment of the Seventh Amendment where there had been no reservation of ruling on the motion for directed verdict, despite the fact that the upper court found that there was no fact to be tried by the jury. However, in the subsequent case of Baltimore & Carolina Line v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 (1935), the Supreme Court held that it was error on the part of the trial court to deny defendant's motion for a dismissal of the complaint and for a directed verdict on the ground of insufficiency of the evidence after the trial court had, without objection, reserved decision on the motion and submitted the case to the jury subject to its opinion on the questions reserved. The court thus limited the decision in the Slocum case and held the procedure now under consideration constitutional and proper in a civil action.

[11] The United States contended, in the case under discussion, that Rules 1 and 2 of the rules of practice and procedure authorized by 28 U.S.C.A. § 723 (a) affirmatively prohibit the procedure employed. These rules apply to post-trial motions, whereas in the instant case the motion is a pre-verdict motion.

[12] Thus in Matter of Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920), the court appointed an auditor to simplify the facts to be submitted to the jury in a complicated accounting case; in Patten v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), the court sanctioned the waiver of the constitutional right to a twelve-man jury, permitting an eleven-man jury to decide the facts; and in

done so in the past with the sanction of the Supreme Court cannot be doubted, and, if the decision in *Ex parte United States* is to stand, it would seem that the courts will be free in the future to revise criminal procedure in cases before it, except as such procedure is already regulated by statute or constitutional requirement.[13]

In the adoption of such modifying procedures, the persuasive authority of common law doctrines, state statutes and decisions, and prior federal court decisions will no doubt play an important role. The American system of case decision is in large measure based upon the persuasive authority found in similar cases and applied to questions specifically new. In this realm may be found an abundance of such persuasive authority to support the decision in *Ex parte United States*. The identical procedure has been sanctioned by the Supreme Court of the United States in civil cases,[14] and the use of similar procedures in civil cases may be considered in criminal cases, as is illustrated by *Sparf* v. *United States*,[15] where the court said, "The cases thus cited were, it is true, of a civil nature; but the rules they announce are, with few exceptions, applicable to criminal causes, and indicate the true test for determining the respective functions of court and jury."

Some of the states have statutes permitting this same procedure in civil cases[16] and in many others it has been made the rule without the aid of statute.[17] Some even authorize such action in criminal cases, as is true in Wisconsin where the original proceeding was tried.[18]

The English common law procedure, adopted by the judges traveling on circuit, of taking the verdict of the jury in criminal cases subject to the opinion of the twelve judges on questions of law, is of some persuasive value.[19]

Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933), the court extended the rules of evidence in criminal cases to allow a wife to testify for her husband.

13 See U. S. C. A. Const. Part 2, p. 280, and 23 A. B. J. 355 and 514 (1938).

14 See note 10. 15 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1894).

16 New York Civil Practice Act, §§ 459, 461; Gen. Laws of Mass. 1932, Ch. 231, § 120. Some statutes permit this even though no reservation of ruling on motion for directed verdict is entered. Deering's Code of Civ. Proc. of Cal. 1937, § 629; Idaho Code Ann. 1932, § 7-224; Mich. Comp. Laws 1929, III, § 14,531; Ill. Rev. Stat. 1937, Ch. 110, § 192.

17 Scharff Distilling Co. v. Dennis, 113 Ark. 221, 168 S. W. 141 (1914); Fincher v. Bosworth & Co., 77 Colo. 496, 238 P. 38 (1925); Advance-Rumley Thresher Co. v. West, 108 Kan. 875, 196 P. 1061 (1921); Richmire v. Andrews Elevator Co., 11 N. D. 453, 92 N. W. 819 (1902); State v. Smith, 47 S. D. 216, 197 N. W. 231 (1924).

18 State v. Meen, 171 Wis. 36, 176 N. W. 70 (1920). Though criminal procedure in the federal courts is governed not by state practice, but by federal statutes and decisions of the federal courts, United States v. Murdock, 284 U. S. 141, 52 S. Ct. 63, 76 L. Ed. 210 (1931), the federal courts in deciding matters of criminal procedure feel that they clearly have the right under the Conformity Act to apply the provisions and laws of the state in which the court is held. Avila v. United States, 76 F. (2d) 39 (1935); United States v. Kelly, 51 F. (2d) 263 (1931); United States v. Eagan, 30 F. 608 (1887).

19 After the twelve judges at assize time decided questions of law so reserved, the defendant was discharged. The King v. Isaac Cockwaine, 1 Leach 498, 168 Eng. Rep. 351 (1788); The King v. Parkes and Brown, 2 Leach 776, 168 Eng. Rep.

Numerous federal court decisions exist where appellate courts, possessing the opportunity for mature deliberation not always found in the heat of the trial, have reversed convictions and discharged defendants for the insufficiency of evidence where a motion for directed verdict should have been granted.[20] The action taken in the instant case will now allow such opportunity to the trial judge, and the decision should be attended with beneficial consequences to courts, litigants, and public alike.

D. C. PHILLIPS

INTERNATIONAL LAW—CHANGE OF SOVEREIGNTY—RELATIVE RIGHTS OF DE JURE AND DE FACTO SOVEREIGNS.—At a time when Britain recognized Italy as the de facto government of Ethiopia, but still recognized Haile Selassie as the de jure sovereign, the Negus Negasti brought suit in England for the payment to him of funds due by the defendant wireless company to Ethiopia for the use of a State radio station. The company raised as a defense the right of Italy to the fund. The court held that, regardless of what might be the effect of the de facto status in the territory actually under control, Haile Selassie, as de jure sovereign, had the right to the fund. While appeal was pending, Britain recognized the King of Italy as the de jure sovereign of Ethiopia; and this was held on appeal to have divested the King of Kings of his right to sue.[1]

Although a foreign sovereign is exempt from the jurisdiction of the courts,[2] he has a right to bring suit in them,[3] if he is recognized as a government by the sovereign of the courts in which he seeks to sue.[4]

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488 (1796); The King v. Joseph Bazeley, 2 Leach 835, 168 Eng. Rep. 517 (1799). However, the usual procedure in criminal cases at common law for obviating errors of law made during the trial after verdict was by way of royal pardon. It is of interest to note that Professor Holdsworth, in reply to a letter addressed to him by Thurman Arnold, Assistant Attorney General, during the course of the litigation in Ex parte United States, 101 F. (2d) 870 (1939), suggests that the government's contention that there is no basis at common law for the procedure is probably right and that the only means of dismissing after a verdict of guilty was by way of royal pardon.

20 Thus, to mention a few, the Supreme Court held, in France v. United States, 164 U. S. 676, 17 S. Ct. 219, 41 L. Ed. 595 (1897), that the federal statute upon which the indictment was founded did not cover the instant transaction and that therefore the conviction could not be sustained. In Famous Smith v. United States, 151 U. S. 50, 14 S. Ct. 234, 38 L. Ed. 67 (1894), the evidence did not show that the court had jurisdiction. In Romano v. United States, 9 F. (2d) 522 (1925), the evidence failed to show that any criminal act had occurred. In Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259, 64 L. Ed. 360 (1920), the court did not believe that there was substantial evidence to sustain defendant's conviction. See also Nosowitz v. United States, 282 F. 575 (1922); Cherry v. United States, 78 F. (2d) 334 (1935); Reiner v. United States, 92 F. (2d) 823 (1937).

1 Haile Selassie v. Cable and Wireless, Limited, [1939] 1 Ch. 182.

2 Mighell v. Sultan of Johore, [1894] 1 Q. B. 149; Duff Development Co., Ld. v. Kelantan Government, [1924] A. C. 797.

3 The Sapphire v. Napoleon III, 11 Wall. 164, 20 L. Ed. 127 (1871).

4 Russian Socialist Federated Soviet Republic v. Cibrario, 235 N. Y. 255, 139 N. E. 259 (1923); City of Berne v. Bank of England, 9 Ves. 347, 32 Eng. Rep. 636 (1804). See also Dolder v. Lord Huntingfield, 11 Ves. 283, 32 Eng. Rep. 1097 (1805), where defendant failed to raise the question in time.

In a monarchy, the right has been said to be vested in the sovereign, "subject to a moral obligation on his part to apply it for the benefit of his subjects," whereas in a republic the right is in the state and it may sue in its corporate name.[5] This distinction, apparently a remnant from the days when rulers were absolute, would necessitate treating such a fund as this as a private property right of the Emperor, but it has not been so treated in the cases which follow. More probably, the so-called "moral obligation" of the sovereign really turns him into a quasi-trustee for the people, and a later conquest operates to transfer the trusteeship as an assignment by operation of force. The holding on the original facts in the Haile Selassie case can be justified upon the ground that, if the conqueror is not yet a de jure sovereign, he has not yet demonstrated that his regime is permanent enough to entitle him to become trustee for the people.

The power to recognize a government as de facto or de jure is a purely political power, within the purview of the executive and legislative departments, and their decisions are binding on the courts.[6] If a government which is in fact sovereign within its territory is not yet recognized as de facto sovereign by the government of the forum, its acts and decrees will be treated as void by the courts of the forum.[7] However, though the acts of such an unrecognized government are treated as illegal and void, the courts will not shut their eyes to the facts; and, if such an illegal act has affected private rights, the courts will take notice of it[8]—this being a judicial function and not one for the State Department.[9] International policy may affect the question as to whether the courts will take notice of confiscatory acts or decrees,[10] though this seems to be a usurpation of the State Department's function.

Recognition of the new sovereign, either as de facto or as de jure, relates back to the time when such sovereign was actually in control "and validates all the actions and conduct of the government so recognized from the commencement of its existence."[11] The courts will take

[5] United States of America v. Wagner, L. R. 2 Ch. 582 (1867).

[6] Jones v. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890); Rose v. Himely, 4 Cran. (U. S.) 241 (1808); Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co., [1921] 3 K. B. 532; Duff Development Co., Ld. v. Kelantan Government, [1924] A. C. 797; Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918).

[7] The Nueva Anna, 6 Wheat. 193, 5 L. Ed. 239 (1821); Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N. Y. 23, 170 N. E. 479 (1930), cert. den. 282 U. S. 878, 51 S. Ct. 82, 75 L. Ed. 775 (1930). See also Joint-Stock Co. v. National City Bank, 240 N. Y. 368, 148 N. E. 552 (1925).

[8] Mauran v. Alliance Ins. Co., 6 Wall. 1, 18 L. Ed. 836 (1868); Fred S. James & Co. v. Second Russian Ins. Co., 239 N. Y. 248, 146 N. E 369 (1925).

[9] Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 147 N. E. 703 (1925).

[10] Hennenlotter v. Norwich Union Fire Ins. Soc., 207 N. Y. S. 588 (1924); The Nueva Anna, 6 Wheat. 193, 5 L. Ed. 239 (1821).

[11] Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897); Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co., [1921] 3 K. B. 532; Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, [1925] A. C. 112; Banque de France v. Equitable Trust Co., 33 F. (2d) 202 (1929);

judicial notice of the fact of recognition.[12] The acts of either de jure or de facto sovereigns confiscating property within their territorial jurisdiction are given absolute validity by the courts of other nations without question.[13] In the words of one English case shortly after the United States became independent, "It may be a question for private speculation whether such a law made in Georgia was wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in courts of justice here, whether in private speculation they are wise or foolish."[14] Conflicting with these decisions are two cases holding that a law of a recognized power may be disregarded where it is contrary to public policy or to the usage of nations.[15]

The penal law of even a de jure sovereign will not be enforced in other jurisdictions.[16] Thus an order confiscating all the *private* property of a ruler will not be enforced;[17] but in the instant case, Haile Selassie was suing for state funds.

In the United States it is held that the validity of the acts of a de facto government depends upon its eventual success or failure.[18] A government which is a successor to one which has failed can only take the rights of its predecessor in foreign courts subject to its duties.[19] Previ-

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Molina v. Comision Reguladora, 92 N. J. L. 38, 104 A. 450 (1918); Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); Terrazas v. Holmes, 115 Tex. 32, 275 S. W. 392 (1925); Terrazas v. Donohue, 115 Tex. 46, 275 S. W. 396 (1925); Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918). But see Kennett v. Chambers, 14 How. 38, 14 L. Ed. 316 (1852), deciding that a contract with a de facto power made illegal by a treaty with the de jure sovereign could not be validated by later recognition of the de facto government.

12 Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918); Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897).

13 Monte Blanco Real Estate Corp. v. Wolvin Line, 147 La. 563, 85 So. 242 (1920); Molina v. Comision Reguladora, 92 N. J. L. 38, 104 A. 450 (1918); Hamilton v. Accessory Transit Co., 26 Barb. (N. Y.) 46 (1857); Murray v. Vanderbilt, 39 Barb. (N. Y.) 140 (1863); Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897); Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co., [1921] 3 K. B. 532; M. Salimoff & Co. v. Standard Oil Co. of N. Y., 262 N. Y. 220, 186 N. E. 679 (1933); Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); Princess Paley Olga v. Weisz, [1929] 1 K. B. 718; The Jupiter, L. R. [1924] Prob. 236; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909).

14 Wright v. Nutt, 1 H. Bl. 136, 126 Eng. Rep. 83 (1788).

15 Vladikavkazsky R. Co. v. New York Trust Co., 263 N.Y. 369, 189 N. E. 456 (1934); Wolff v. Oxholm, 6 M. & S. 92, 105 Eng. Rep. 1177 (1817).

16 Ogden v. Folliot, 3 T.R. 726, 100 Eng. Rep. 825 (1790); Macleod v. Attorney-General for New South Wales, [1891] A.C. 455; Lecouturier v. Rey, [1910] A.C. 262; Huntington v. Attrill, [1893] A.C. 150, in which case, however, it was held that the action was remedial of a private right.

17 Banco de Vizcaya v. Don Alfonso de Borbon y Austria, [1935] 1 K.B. 140.

18 Williams v. Bruffy, 96 U.S. 176, 24 L. Ed. 716 (1878); Compania Minera v. Bartlesville Zinc Co., 115 Tex. 21, 275 S.W. 388 (1925).

19 United States v. Prioleau, 2 Hem. & M. 559, 71 Eng. Rep. 580 (1865); Republic of Peru v. Dreyfus, 38 Ch. D. 348 (1888); King of Two Sicilies v. Willcox, 1 Sim. N.S. 301, 61 Eng. Rep. 116 (1851); United States of America v. McRae, L.R. 8 Eq. 69 (1869).

ously a distinction has been recognized between acts within the jurisdiction and rights without the nation,[20] a de facto government having no rights except as to property which has been within its power and has had that power exerted on it.[21] Two recent cases have held that a de facto power over banks within the jurisdiction operates to give the de facto sovereign power over the foreign balances of those banks.[22] Though the one was consistent with the above limitation of de facto powers, holding that the "acts of the government which His Majesty's Government recognizes as the de facto government . . . cannot be impugned as the acts of a usurping government, and conversely the court must be bound to treat the acts of a rival . . . de jure government . . . as a mere nullity,"[23] the other case was placed upon the broader ground that a de facto state must "for all purposes" be treated as "a duly recognized foreign state," while all that a de jure recognition does is give the sovereign some color of right to reconquer his country.[24] This ground, which makes de facto recognition equivalent to de jure recognition, is obviously contrary to the holding on the original facts in the Haile Selassie case, which distinguished the above case on its facts. Although it may involve illogical distinctions between acts within the country and extraterritorial rights, it is submitted that, not only is the final holding in the Haile Selassie case sound because the new de jure sovereign is now entitled to be trustee for the people, but the holding on the original facts is also sound, (1) because, as before mentioned, the withholding of de jure status from Italy showed a belief by the State Department that its regime was not yet permanent enough to entitle it to become quasi-trustee for the people, and (2) because the probable intent of the political departments in withholding de jure recognition is to deny the rights to international comity, while not denying the existence of acts that do in fact exist. However, attention should be called to a serious difficulty which will arise in cases where a debtor has property within the power of the de facto sovereign; a decision of that ruler's courts awarding the debt to the de facto sovereign, plus a decision of another ruler's courts awarding the debt to the de jure sovereign, will result in compelling the debtor to pay his debt twice over. Hence probably the de facto government should triumph even in an extraterritorial suit in a case where property of the debtor is within the de facto ruler's power, this being considered an extension of the proposition that the courts will not shut their eyes to the fact that a de facto government does exist and has powers.

R. W. BERGSTROM

LANDLORD AND TENANT—DAMAGES—NECESSITY OF RELETTING PREMISES FOR FULL TERM TO RECOVER FULL DAMAGES ON LONG TERM LEASE WHEN LESSEE HAS ABANDONED PROPERTY.—Of interest to landlords with properties rented

20 H. T. Cottam & Co. v. Comision Reguladora, 149 La. 1026, 90 So. 392 (1921).

21 Hamilton v. Accessory Transit Co., 26 Barb. (N.Y.) 46 (1857).

22 Banco de Bilbao v. Rey, [1938] 2 K.B. 176; Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] Ch. 513.

23 Banco de Bilbao v. Rey, [1938] 2 K.B. 176.

24 Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] Ch. 513.

under long term leases is the recent case of *People ex rel. Nelson* v. *West Town State Bank*,[1] in which the court held that future damages accruing under a lease with twenty-eight years to run were, in the absence of a new lease for the remainder of the term, so uncertain and speculative that the landlord must await their accrual. The court also held that the distribution of receivership assets need not wait, which would seem to bar the future damages absolutely.

The lessee in this case was a bank which had ceased operations. The receiver of the bank vacated the premises while the lease still had about thirty-three years to run. The lessor took possession, rented the premises for five years, and, having sustained a loss of $1054 per year for the said five year period after the abandonment of the premises, filed a claim in the receivership proceedings for $28,458, the basis of which was that a similar loss would be sustained for the balance of the term. The court held that, because of the uncertainty as to the amount of damages to be sustained, the lessor could not recover damages for the future but would have to await the accrual thereof.

It is well settled that the measure of damages for the wrongful breach of a lease is the difference between the rent reserved and the rent received from another letting, provided due diligence was used by the landlord.[2] It is quite probable that if the plaintiff here had relet the premises for the balance of the term at a lower rental than the amount reserved in the bank's lease, the claim would have been allowed. As a matter of fact, the court distinguishes the case of *Smith v. Goodman*,[3] in which case the premises were so relet, on that ground.

It would seem to be clear in the instant case that the experience of the first five years after the breach of the lease was not sufficiently certain to warrant its use to estimate damages for twenty-eight years in the future, no lease having been entered into for the balance of the term.

M. H. TUTTLE

MASTER AND SERVANT—NATIONAL LABOR RELATIONS ACT—TERMINATION OF RELATION OF MASTER AND SERVANT.—The highest court in the land has handed down another opinion[1] in which the following most interesting question is raised: When an employer, admittedly guilty of unfair labor

1 299 Ill. App. 242, 20 N. E. (2d) 156 (1939).

2 De Winer v. Nelson, 54 Idaho 560, 33 P. (2d) 356 (1934); Wilson v. National Refining Co., 126 Kan. 139, 266 P. 941 (1928); Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928); Jones v. McQuesten, 172 Wash. 480, 20 P. (2d) 838 (1933); Resser v. Corwin, 72 Ill. App. 625 (1897); Hinde v. Madansky, 161 Ill. App. 216 (1911); Levy v. Burkstrom, 191 Ill. App. 478 (1915).

3 149 Ill. 75, 36 N. E. 621 (1893). A three-year lease was abandoned by the assignee of the lessee at the end of the first year. It was held that, since the premises had been relet for the balance of the term and since the lease provided that the measure of damages should be the difference between the amount received from a reletting and the rent reserved, the claim for damages could be proven against the insolvent estate.

1 National Labor Relations Board v. Fansteel Metallurgical Corp., 83 L. Ed. (Adv.) 469 (1939).

practices within the meaning of the National Labor Relations Act, discharges employees who are engaged in a "sit-down" strike,[2] under what circumstances does the National Labor Relations Board have authority to order their reinstatement?[3] Language in the act to the effect that the board may reinstate only "employees"[4] and do only those things necessary "to effectuate the policies"[5] of the act provides only the skeleton of an answer, leaving the meat to be filled in by the courts.

In order to approach the problem effectively, it is necessary to consider the facts in the Fansteel case in some detail. The employer had engaged in such unfair labor practices as encouraging the formation of a company union, isolating the president of the employee's organization, and refusing to bargain with the majority unit. The strikers took over two key buildings of the plant, thereby suspending operations. The plant superintendent formally requested a surrender of the buildings, and announced, after a refusal of the men so to do, that all men holding the buildings were discharged. An injunction proved unavailing, and the strikers repulsed the sheriff's attempt to enforce a writ of attachment. A week later the sheriff was successful, the plant resumed operations, and some of the men were sentenced for contempt. About one-third of the strikers were taken back, and new men were hired in the places of the others. None of those found guilty of contempt were recalled. The basis for reinstatement is not clear, but the board found that none of the persons named in the complaint were discharged or denied reinstatement by reason of union membership or activity.

The purposes of the act have been variously stated, the declared policy being to remove obstructions to interstate commerce caused by absence of collective bargaining in industry. In view of the fact that its validity is hung upon the interstate commerce peg,[6] these statements of the courts upon that question are perhaps most appropriate: "to safeguard the flow of interstate commerce by protecting the right of employees 'to organize and bargain collectively' "[7] and "to obviate appeals to brute force which are too often the accompaniment of labor disputes."[8] With

[2] The sit-down strike as a labor device appears to have arisen within the confines of the aircraft industry, the United Aircraft incident being the forerunner of a veritable epidemic during the years 1936 and 1937, the main event being the Douglas Aircraft affair.

[3] Section 8 (3) of the act, 29 U.S.C.A. § 158 (3), forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . " Section 2 (3), 29 U.S.C.A. § 152 (3), defines an "employee" as an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . . "

[4] 29 U.S.C.A. § 152 (3). [5] 29 U.S.C.A. § 160 (c).

[6] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

[7] Black Diamond Steamship Corp. v. National Labor Relations Board, 94 F. (2d) 875 (1938).

[8] National Labor Relations Board v. Delaware-New Jersey Ferry Co., 90 F. (2d) 520 (1937).

the provisions and purposes of the act thus in view, it becomes less difficult to decide whether or not these "sit-strikers" remained employees, eligible for reinstatement and, if not, whether their reinstatement would accomplish the object which Congress had in mind.

Just what effect does the act have on an employer's right to determine whom his employees shall be? Section 9 (a) of the act[9] "does not prevent the employer 'from . . . hiring individuals on whatever terms' the employer 'may be unilateral action determine,' "[10] although Section 8 (3)[11] rather obviously prohibits the making of "yellow-dog" contracts or hiring in the first instance on the basis of unionism. Be that as it may, however, the act does not purport to "preclude the discharge of any employee for any reason that seems proper to the employer other than union activities or agitation for collective bargaining with employees."[12] Such a conclusion is inevitable under the rule that as between two possible constructions of a statute the one which would render the statute unconstitutional or even raise a serious constitutional question must be discarded.[13] Certainly a statute which takes away the right of an employer to discharge for cause would unwarrantably interfere with the freedom of contract.[14] It is true that the ordinary right to select em-

[9] 29 U.S.C.A. § 159 (a). In National Labor Relations Board v. Bell Oil & Gas Co., 91 F. (2d) 509 (1937), the court stated that the act does not " 'interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' " The language was approved in Appalachian Elec. Power Co. v. National Labor Relations Board, 93 F. (2d) 985 (1938). However, there are no available cases which determine what that normal right to hire and fire might be.

Section 9 (a), 29 U.S.C.A. § 159 (a), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

[10] National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

[11] 29 U.S.C.A. § 158 (3). The conclusion seems inevitable, despite Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260 (1917), in which an injunction restraining violation of such a contract was granted; Coppage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915), in which a state statute declaring such contracts illegal was held unconstitutional; and Adair v. United States, 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908), holding a similar federal statute invalid.

[12] Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S. Ct. 650, 81 L. Ed. 953 (1937).

[13] Among a long line of cases so holding are United States v. Delaware & Hudson Co., 213 U.S. 366, 29 S. Ct. 527, 53 L. Ed. 836 (1909), and Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

[14] In Standard Lime & Stone Co. v. National Labor Relations Board, 97 F. (2d) 531 (1938), the court said, "The right of an employer to discharge or to refuse to reinstate a man who has committed a crime which endangers the safety of his fellow workmen or the integrity of the plant cannot be successfully challenged. The statute does not purport to destroy this right, or contemplate that an employer must continue to employ or to treat as employees men who have engaged in unlawful conduct of this character."

ployees becomes vulnerable[15] on the commission of an unfair labor practice, but it does not die.

It is difficult to conceive how a general reinstatement in the instant case would effectuate the policies of the act.[16] It is equally difficult to see how such reinstatement does not "condone"[17] violent or illegal employee acts. To say that the board has no regulatory power over employees and does not inquire into the degree of culpability of employees' acts is no answer. Looking at the matter from a practical standpoint, the average employee does not know the technicalities of the Wagner Act, and when reinstated he is of the opinion that his past conduct has been given a stamp of approval. If that conduct has been violent or illegal he believes he is justified in engaging in it or similar conduct again. At least one court has supported the familiar argument that reinstatement under such circumstances only serves "to promote discord between employer and employee."[18]

The cases are apparently irreconcilable as to the character of the atrocities perpetrated by employees which will preclude the board from ordering reinstatement after discharge.[19] Attempting to distinguish between misdemeanors and felonies, or between degrees of violence,[20] can only result in the creation of empty distinctions. Certainly it cannot be said that the right of an employer to employ and discharge is to be controlled by criminal codes.[21] There is also an intimation that the line must be drawn by the board itself,[22] but the warrant of authority for such proposition is difficult to find. The board's discretion is limited to finding the facts and determining what action is necessary under the facts as so found to effectuate the clearly stated policies of the act. Comparable attempts to distinguish between degrees of damage, as in the Douglas Aircraft case, or to determine whether or not the acts constituted "sabotage," as in the Fansteel case, can lead to no better result.

Let us examine the board's argument that the order is justified under its power to reinstate "employees." If an employee has been discharged for cause, the board has no power to reinstate,[23] even though union activ-

15 Black Diamond Steamship Corp. v. National Labor Relations Board, 94 F. (2d) 875 at 879 (1938).

16 Section 10, 29 U.S.C.A. § 160.

17 Note, 33 Ill. L. Rev. 208.

18 National Labor Relations Board v. Thompson Products, Inc., 97 F. (2d) 13 (1938).

19 Available cases range from dynamiting the plant in the Republic Steel case to a one and one-half hour sitdown in the Douglas Aircraft case.

20 As was done in the Republic Steel Case, N.L.R.B. Case No. C-184 (Apr. 8, 1938), where the Board in determining whether or not reinstatement was proper took into consideration evidence of convictions of strikers and pleas of guilty to acts of violence.

21 In Thompson Cabinet Co. v. C.I.O., 11 N.L.R.B. 99 (Mar. 14, 1939), the Board refused reinstatement of an employee who had been found to have been discriminatorily refused reinstatement and who had offered to act as a labor spy, on the grounds that reinstatement would not effectuate the policies of the Act.

22 Note, 33 Ill. L. Rev. 208 at 210.

23 In National Labor Relations Board v. Oregon Worsted Co., 96 F. (2d) 193 (1938), the court looked to the evidence to ascertain whether the man was discharged for cause in order to determine whether the court had power to reinstate.

ity is one of the contributing reasons for the employer's so doing.[24] The term "employee" was given a peculiarly wide definition[25] in the act for the single purpose of preserving the employment relation despite a labor dispute or unfair dismissal.[26] Further expansion beyond this definition seems unjustified. Congress went far enough in carefully failing to reach all the evils within its grasp.[27] The courts also went far enough in holding that an employee who goes on strike retains his status although there is no reasonable justification for his so doing.[28] Certainly it is not unreasonable to construe vandalism as "a renunciation of the employment relation."[29]

The dissenting opinion[30] in the Fansteel case took the position that labor strife commonly gives vent to improper conduct, that Congress thought it desirable to continue the eligibility of the striker regardless of such conduct, and that the striker remains amenable to punishment by the state.[31] Clearly the preservation of the "right to strike" in Section 13 of the act contemplates negative, not affirmative, conduct.[32] If the product of a heart "regardless of social duty and plainly bent on mischief" does not look to a termination[33] of the employment relationship,

Presumably, if it were for cause the Board had no power to reinstate, even though others discharged for the same cause were reinstated.

[24] In the matter of United Fruit Co., 2 N.L.R.B. 896 (1937). The situation bears some analogy to the tort rule whereby a man owes no duty to assist another man, his enemy, out of danger, provided he was not responsible for the circumstances of the latter.

[25] See Note 3.

[26] Note, 33 Ill. L. Rev. 187 at 195.

[27] In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 46, 57 S. Ct. 615, 81 L. Ed. 893 at 916, 917 (1937), the court said the validity of the Act is not affected by the fact "that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. . . . The legislative authority, exerted within its proper field, need not embrace all the evils within its reach."

[28] National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938). Query whether such holding conflicts with the statement in the Black Diamond S. S. case that "each party to a labor controversy is left to use its own economic strength in all lawful ways to promote its advantage."

[29] In National Labor Relations Board v. Sands Mfg. Co., 59 S. Ct. 508 at 514, 83 L. Ed. (Adv.) 488 (1939), the court said, "The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer." The court thus seems to take the position that the right of the Fansteel Company is beyond dispute, and that once the relation was severed the employer could deal with the individuals as it pleased.

[30] Justices Reed and Black wrote the opinion.

[31] See Fansteel Metallurgical Corp. v. National Labor Relations Board, 98 F. (2d) 375 (1938).

[32] The "sit strike" as a labor device was not known at the time the act was drafted, the ordinary strike being nothing more than a refusal to work.

[33] In Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. (2d) 134 (1937), the court said, "The relationship existing between employer and employee is not necessarily terminated by strike, and, in the absence of any action looking to the termination of that relationship, employees are entitled to rank as employees."

it is difficult to conceive how that result may be brought about.[34]

In view of the fact that the employment relationship was effectively terminated in the Fansteel case and of the additional fact that reinstatement of the strikers would not effectuate the policies of the National Labor Relations Act, the board's order holding the discharge unlawful was "an injustice not only to the employer, but to the unions and their friends who wish them well."[35] L. BRUNETTE

WORKMEN'S COMPENSATION—PERSONS AND EMPLOYMENTS NOT WITHIN THE ACT—WHEN AN ASSISTANT HIRED BY AN EMPLOYEE IS WITHIN THE ACT.—An interesting question arose when the helper of a driver on a Times newspaper truck sued the Times Publishing Corporation for personal injuries sustained as a result of a collision in which the truck driver was found to be guilty of negligence.[1] The driver was employed by the defendant corporation to drive one of its trucks in the delivery and distribution of Times newspapers. The driver hired as his helper the minor plaintiff, whose duties were to assist the driver on his route by loading and unloading the truck and by counting and binding papers. The helper was paid three dollars per week and was given one meal a day by the driver, who was not reimbursed by the corporate defendant.

The plaintiff's action was based on the common-law theory that he was an invitee to whom the defendant owed a duty to exercise reasonable care. The complaint alleged that he was riding in the newspaper truck "at the invitation and request of [the driver] with the knowledge, actual or constructive, of the corporate defendant upon the business of the defendant. . . ."[2] So far as it is pertinent to the appeal the answer admitted the allegations and concluded that the plaintiff was an employee of the corporate defendant and therefore was bound by the provisions of the Workmen's Compensation Act. The jury found for the plaintiff, assessing damages at $27,000,[3] and from a judgment thereon the defendant appealed. The Appellate Court, denying that the trial court erred in rejecting the defendant's motion for a directed verdict, affirmed the judgment.

It is fundamental that where the evidence as to the existence of a certain legal relation is undisputed and reasonably susceptible of but a single inference the finding of the relationship is a matter of law and

34 Cases in which the employer engages in a subtle plan or scheme, the primary purpose of which is to undermine the efforts of his employees to organize for bargaining purposes, such as In the Matter of Algonquin Printing Co., 1 N.L.R.B. 264 (1936), have not been considered in this comment. Naturally an employer is not to be allowed to discriminate indirectly, while Sec. 8 (3), 29 U.S.C.A. § 158 (3), forbids him to do so directly.

35 Fansteel Metallurgical Corp. v. National Labor Relations Board, 98 F. (2d) 375 at 381 (1938).

1 Kijowski v. Times Pub. Corp., 298 Ill. App. 236, 18 N. E. (2d) 754 (1939).

2 At p. 238.

3 The plaintiff's recovery under the compensation act would be limited to $470.00 for the loss of a leg, plus medical and hospital expenses, plus fifty per cent of this amount as a penalty, since the plaintiff was illegally employed. Ill. Rev. Stat. 1937, Ch. 48, § 145.

should not be left to the jury.[4] It follows, therefore, that the determination as to whether the court erred in rejecting the defendant's motion for a directed verdict depends on whether the undisputed facts establish an employer-employee status as a matter of law.

The Compensation Act defines an employee as "every person in the service of another under any contract of hire, express or implied, oral or written. . . ."[5] The act is designed to replace the ineffectual and uncertain common-law remedy of a servant against his master and to abrogate the latter's common-law defenses by establishing a fair guaranty of compensation for injuries arising out of and in the course of the employment.[6] It is apparent, therefore, that the act has reference to those cases arising out of the common-law master and servant relationship. So, too, courts dealing with statutes similar to our own in other jurisdictions have said that by the employer-employee relation is meant a master and servant relation.[7] In fact, it has been generally held that the master and servant relation is "that which arises out of a contract of employment, express or implied, between a master or employer and a servant or employee."[8]

The question in the instant case then is whether the plaintiff, who is an assistant to a servant of the defendant, is himself a servant of the defendant. In the few cases in Illinois[9] where the injured party was an assistant to a servant helping him in the course of the master's business it was only necessary for the court to determine that the assistant was an invitee as distinguished from a mere licensee or trespasser. Since a servant is also a type of invitee those cases do not negative the possibility that an assistant to a servant working in the course of the master's business is himself a servant of the master.

A frequently cited case on the question is *Paducah Box and Basket Co.* v. *Ruby Parker*.[10] There the plaintiff was hired by two of the employees of the Paducah Company. The employees operated a machine that made wire baskets. The plaintiff, with the permission of the employer, was hired by the employees to assist in stitching bottoms on baskets. The plaintiff sued the Paducah Company for injuries sustained when her apron was caught in a revolving shaft which was negligently allowed to remain unguarded. The Paducah Company defended on the

[4] See Cinofsky v. Industrial Com., 290 Ill. 521, 125 N. E. 286 (1919).

[5] Ill. Rev. Stat. 1937, Ch. 48, § 142. The fact that the plaintiff was illegally employed does not affect his right to recover under the Workmen's Compensation Act, but gives him the additional right to file a notice of rejection of his rights under the compensation act and to sue under his common-law right, provided the notice is filed within six months after the injury. See Landry v. Shinner, 344 Ill. 579, 176 N. E. 895 (1931).

[6] See Victor Chemical Works v. Industrial Board of Illinois, 274 Ill. 11, 113 N. E. 173 (1916); Kinnan v. Chas. B. Hurst Co., 301 Ill. 597, 134 N. E. 72 (1922).

[7] Larson v. Independent School District, 53 Ida. 49, 22 P. (2d) 299 (1933).

[8] 39 C. J. 33, § 1; Cooley, Torts (4th ed.), III, 42.

[9] Purtell v. Philadelphia & R. Coal and Iron Co., 256 Ill. 110, 99 N. E. 899 (1912); Chicago W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38 (1904).

[10] 143 Ky. 607, 136 S. W. 1012, 43 L. R. A. (N. S.) 179 (1911).

grounds that the plaintiff was not its employee. The court denied the merits of this contention, saying: "It is not necessary, to create the relation of master and servant, that the master shall directly employ the servant, or that the servant shall be directly responsible to the master, or that the master shall have authority to control his employment, fix his wages, or discharge him. When a person who undeniably occupies the relation of servant employs, with the consent and approval of the master, another to assist him in the performance of the duties he is discharging for the master, the relationship of master and servant is thereupon created between the master and the person so employed, although the person so employed may be compensated by and be under the immediate control of the person employing him."[11]

In an Oregon case,[12] a minor was employed by his father as an assistant in a mine. The father received their joint earnings, but the car tickets were made out in the names of both the father and son. The court there said that the fact that the minor, with the express or implied consent of the owner of the mine, assisted his father was sufficient to create the relation of master and servant between the minor and the owner. Many other cases,[13] some of which were relied on in the Oregon case, affirm the aforementioned rule.

Following the rule of the above cases it would seem that the plaintiff in the instant case is an employee of the defendant corporation. The Illinois Appellate Court did not question this rule but merely said: "If knowledge as well as acquiescence was necessary in the employment of the boy, then the record as to fixing his employment is silent."[14]

Of course the court in the Paducah case and in the Oregon case found that not only did the employer have knowledge of the employment but also that he acquiesced in it. Yet, is the instant case so different? Contrary to the court's statement quoted above, it would seem that the employer did have knowledge of the employment. The plaintiff alleged in his complaint that the defendant had knowledge of the employment, and the defendant expressly admitted it in his answer. As to the question of acquiescence, the answer is less obvious. In this connection it is noted that the court in the Paducah case and in the Oregon case did not deem it essential to determine whether the acquiescence was created

11 At 136 S. W. 1013.

12 Ringue v. Oregon Coal & Navigation Co., 44 Ore. 407, 75 P. 703 (1904).

13 Tennessee Coal Iron & R.R. Co. v. Hayes, 97 Ala. 201, 12 So. 98 (1892). See Chicago W. & V. Co. v. Moran, 210 Ill. 9, 71 N. E. 38 (1904), where under substantially the same facts the court, while actually finding merely that the plaintiff was not a mere licensee, used language which would imply the existence of an employer-employee relation; Call Pub. Co. v. Ind. Accident Com. of Calif., 89 Cal. 194, 264 P. 300 (1928), where the facts are almost identical with those of the Kijowski case but the court found that the employer permitted the employee to hire the assistant; Schmidt v. Wm. Pfeifer Berlin Weiss Beer Brewing Co., Ill. Ind. Comm. Bulletin No. 1, p. 118, where the driver of a beer delivery truck had an assistant who helped the driver solicit orders and deliver beer, which helper was held to be an employee of the brewing company so that he could recover under the compensation act for his injuries.

14 Kijowski v. Times Pub. Corp., 298 Ill. App. 236 at 243, 18 N. E. (2d) 754 (1939).

by implication or by expressed consent. If acquiescence may be implied, and logic compels such a conclusion, certainly no other case could present facts and circumstances from which it would be more reasonable to imply acquiescence than the instant case. As previously stated, the defendant admitted knowledge of the fact that the driver hired the plaintiff. In addition the evidence shows that the plaintiff's duties required him to be on the defendant's premises at certain times during the day to load and unload the papers. Moreover, it would be impossible for the driver to finish his daily work if he had to park his truck at every news stand, count and bind the papers himself, and carry them to the stands. These circumstances, in addition to the fact that there is no evidence that the defendant ever objected to the employment, might very well have been grounds for a finding of acquiescence on the part of the defendant. But the Appellate Court said: "Now the jury in the instant case did find by its verdict that the plaintiff's minor was not an employee of the defendant company. . . ."[15] If, of course, it was a proper question for the jury to answer under the circumstances, we must trust that their decision rested upon a careful consideration of all the evidence.[16]

Aside from a possible difference arising from the question of acquiescence there is another difference between the instant case and those previously mentioned. In the Paducah case and in the Oregon case, the plaintiff was trying to establish that he was an employee of the defendant company. In each case, the cause of action was based upon a breach of a duty owed by a master to his servants. In the instant case, the plaintiff's right to recover depended on a determination that he was not an employee of the defendant company. As a matter of logic it is not material how the question arises or which party is attempting to establish or deny the existence of the relationship. But the aforementioned difference in the cases does serve a purpose in that it brings to light another question. Can it be said that, in all cases where the employer has knowledge of, and acquiesces in, his employee's conduct in hiring an assistant to do work in the furtherance of the employer's business, the assistant becomes an employee of the employer? The knowledge and acquiescence in the employment merely operate as a ratification. It would seem to follow, therefore, that if the employee did not intend to hire the assistant on behalf of the employer the latter could not by ratification make the assistant his employee. Under such circumstances, the so-called employee would be, as to his assistant, an independent contractor, and the employer would not be responsible for torts to the assistant. In turn it would seem to follow that where an assistant enters a contract with an employee who hires as an agent and not

[15] Kijowski v. Times Pub. Corp., supra, at page 243.

[16] Suppose, however, that the injury was accidental and that consequently the defendant would not be liable at common-law, it would not have been surprising had the jury, traditionally philanthropic as it is, found that the plaintiff was an employee of the defendant company so that he could recover under the compensation act.

as a principal, the contract binds the employer, if the employee had authority to hire the assistant or if the employer ratified the contract.

Did the plaintiff contract with the driver as a principal in the instant case? It would seem inconsistent for the plaintiff to claim that he contracted with the driver as principal and not as an agent of the defendant company, and, at the same time, to claim that the defendant company is responsible for the driver's torts committed against him and arising out of the employment. In other words, the plaintiff in bringing his action against the corporate defendant for the tort of the driver has admitted that he has dealt with the driver in his representative capacity and not as a principal.

In conclusion it may be said that there is a common-law principle to the effect that when an assistant enters into a contract of employment with a servant in his representative capacity and in furtherance of the master's business, with the knowledge and acquiescence of the master, the assistant becomes a servant of the master; that this principle is applicable to the employer-employee relationship under the Workmen's Compensation Act; and that the instant case presents facts and circumstances from which the court might have held that the plaintiff was an employee.

W. H. MAYNOR